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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 374

BOB-LO EXCURSION COMPANY,
Appellant,

vs.

THE PEOPLE OF THE STATE OF MICHIGAN.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MICHIGAN.

STATEMENT AS TO JURISDICTION

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 374

THE PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff and Appellee,

vs.

BOB-LO EXCURSION COMPANY, a Michigan Corporation,
Defendant and Appellant.

STATEMENT DISCLOSING BASIS OF APPELLATE JURISDICTION UPON APPEAL AS REQUIRED BY SUPREME COURT RULE No. 12.

Pursuant to Rule 12, paragraph 1, Revised Rules of the Supreme Court of the United States, the above defendant files this its statement particularly disclosing the basis upon which it is contended that the Supreme Court of the United States has jurisdiction upon appeal to review the judgment in question of the Supreme Court of Michigan:

I.

The statutory provisions believed to sustain appellate jurisdiction are Sec. 237 (a) of the Judicial Code Act of

1d

February 13, 1925; Chapter 229, 43 Stat. 936; as amended by Act of January 31, 1928, Chapter 14, 45 Stat. 54; Act of April 26, 1928, Chapter 440, 45 Stat. 466 (Judicial Code, Sec. 237, U. S. Code Annotated, Title 28, Sec. 344 (a)), which provide in effect that the Supreme Court of the United States may upon appeal review a final judgment of the Supreme Court of Michigan, which is the highest court of that state, where there has been drawn in question the validity of a statute of the State of Michigan on the ground that it is repugnant to the Constitution of the United States (Article I, Section 8, (3); and Sec. 1 of the XIV Amendment), and the decision of the Supreme Court of the State of Michigan is in favor of the validity of the State statute. *Morgan* v. *Virginia*, 66 Sup. Ct. Rep. 1050 (June 3, 1946); *Southern Pacific Co.* v. *Arizona*, 325 U. S. 761; *Detroit International Bridge* v. *Corporation Tax Appeal Board*, 294 U. S. 83.

II.

The statute of the State of Michigan the validity of which is involved is the Michigan "Civil Rights" Act so-called as amended (Act 117, P. A. 1937; Sec. 17115-146, 7 Mason's Cumulative Supplement; Stat. Ann. 1946 Cum. Supp. Sec. 28.343, 4). This act provides that equal accommodations, facilities, etc., shall be furnished by amongst others "public conveyances on land and water" and that no discrimination shall be shown by such conveyances on account of race, creed or color. Penalties by fine or imprisonment or both are provided for violation

III.

The nature of the case and the rulings of the court to bring the case within the aforesaid jurisdictional requirements are as follows, viz: In 1945 the defendant refused to carry a colored girl, and because she was colored, upon one

of its vessels from its dock at Detroit, Michigan, to Bob-Lo Island, Ontario, Canada. It tendered to her in repayment the price of the ticket which she refused. For its action in refusing her passage defendant was prosecuted, convicted and sentenced under the above "Civil Rights" Act. The defendant is organized as a Michigan corporation for profit, is not a common carrier, and its principal business consisted, as set forth in the opinion of the Supreme Court of Michigan, in the transportation of passengers from Detroit upon the Detroit River "to and from Bob-Lo Island (also known as Bois Blanc) and the operation of facilities for recreation and amusement owned by it on Bob-Lo Island. Except for four lots this Island is owned by defendant. It is a part of the Province of Ontario, Dominion of Canada. Only defendant's ships have access to Bob-Lo Island. Ordinarily these ships make round trips between Detroit and the Island, but occasionally they also make round trips between Windsor, Ontario, and Bob-Lo Island. But defendant does not transport passengers from Canada to Michigan. In traveling between Detroit and the Island defendant's ships cross the international boundary line several times and are in Canadian waters for about a half of the voyage. Defendant's ships are required by federal law to be enrolled by the United States Customs Service, and the enrollment license must be renewed annually. Defendant's commerce activities and ships are subject to regulations and inspection by the United States Treasury, the United States Immigration Service, the United States Navy Department and the United States Army Engineers. Its ships are also regulated by similar governmental agencies of the Dominion of Canada."

The above business of defendant is foreign commerce, *Gibbons* v. *Ogden*, 9 Wheaton 1; *Lord* v. *Goodall S. S. Co.*, 102 U. S. 541; *Hanley* v. *Kansas City So. Ry. Co.*, 187 U. S.

617; *Edwards* v. *California*, 314 U. S. 160, and the Supreme Court of Michigan so held in its opinion.

IV.

The defendant being so engaged in foreign commerce it is contended in its behalf that the above mentioned "Civil Rights" Act of Michigan is void or at least may not constitutionally be applied to defendant when so engaged in such foreign commerce, *Hall* v. *DeCuir*, 95 U. S. 485. No two cases could be more similar. There a statute of Louisiana was for all practical purposes identical with the Michigan statute here involved. There defendant's vessel plied on the Mississippi River from New Orleans, Louisiana, to a point in the state of Mississippi (two states). In the case at bar the vessel plied on the Detroit River from Michigan to a point in Canada (two countries). There a colored person sought to take passage between two points each in Louisiana (the vessel however touching during such voyage at an intermediate landing in Mississippi), she was refused transportation and the action followed. Here a colored person was refused such passage between Michigan and Ontario, Canada. The Supreme Court of the United States found the Louisiana statute to be void as an unconstitutional regulation by the State of Louisiana of interstate commerce. The Michigan Supreme Court found the Michigan statute valid even as to those engaged in foreign commerce. The opinion of the Supreme Court of Michigan in discussing the *DeCuir* case observed that there "The court based decision upon the assumption that by reason of traversing the waters of various states and stopping at ports in such States" (two states only) "The carrier might meet with statutory requirements of various types, and with which the Louisiana statute might be in conflict and compliance with both would be quite impossible." So too in the case before us, the vessel

stops at ports in two countries, and defendant herein is confronted with a similar statute, an identical burden, and the identical possibility of Ontario and/or Canadian contrary regulation which existed from the state of Mississippi in the *DeCuir* case, but to a somewhat greater extent here because Ontario or Canada may lawfully regulate traffic on her waters and her island—while therein Mississippi could not constitutionally do so. Again how may it be said in the absence of gazing into a crystal globe as was stated in the opinion of the Supreme Court of Michigan that this "defendant in carrying on its commerce or transportation will not be subjected to an undue burden arising from conflicting regulations." Louisiana had its statute like Michigan—Mississippi had passed no contradictory regulation—the mere *possibility* that Mississippi *might* do so was the causation leading to the invalidation of the Louisiana statute. So likewise here, the province of Ontario or the Dominion of Canada may, indeed *have the right* (which Mississippi did not have constitutionally) to make valid regulations in utter conflict with Michigan's statute. From the very nature of things (commerce between two *countries*), the matter becomes national and beyond the scope of the state.

The case of *Hall* v. *DeCuir, supra,* has been consistently followed by the Supreme Court of the United States for seventy years, the last or one of the last of such occasions being in June, 1946, where a Virginia statute requiring that contiguous seats on interstate buses should not be occupied at the same time by persons of different races was held to be invalid under the commerce clause as burdening interstate commerce, *Morgan* v. *Virginia,* 66 Sup. Ct. Rep. 1050. Congress has not acted to regulate as to carriage of colored in interstate or foreign commerce of either bus lines (Morgan case) or water carriers such as defendant who does not

carry freight and who maintains no joint through rate with a railroad or other carrier. In the *Morgan* case all the majority opinions relied heavily on *Hall* v. *DeCuir* as being controlling. In the latter case Mr. Justice Burton filed a dissenting opinion holding the statute valid and remarking that the opinions of the majority of the court might lead to questioning the validity of such statutes as Michigan's "Civil Rights" Act. That very question is now before us. A New York statute (upon which the Michigan statute was based) was likewise stricken as to those engaged in foreign commerce as being violative of the commerce clause, *Pryce* v. *Swedish American Lines*, 30 Fed. Sup. 371; see also *Henderson* v. *N. Y.*, 92 U. S. 259; *Board of Trustees* v. *U. S.*, 289 U. S. 48.

That there is a substantial federal question necessarily involved as to the validity of any such state legislation attempting to so regulate foreign commerce is indubitable, witnesseth practically identical statutes and facts involved in *Hall* v. *DeCuir* and *Pryce* v. *Swedish American Lines, supra.* The same principle and theory was likewise applied in *Morgan* v. *Virginia, supra.* The opinion herein of the Michigan Supreme Court is almost exclusively devoted to this federal question. The Michigan statute contains provisions for fines or imprisonment or both for its violation.

V.

Secondarily, defendant also contends said Michigan "Civil Rights" statute violates Sec. 1 of the 14th Amendment to the Constitution of the United States in that the said statute deprives defendant of its property without due process of law and deprives defendant of the equal protection of the laws. For the state to require defendant (not being a common carrier) to carry all persons without regard to race or color is to substitute the judgment of the State as to

the management of its business for its own judgment; for the state to regulate and control the conduct of a private business (for defendant is not a common carrier, *Meisner* v. *Detroit, Belle Isle & Windsor Ferry Co.*, 154 Mich. 545). See also *Public Utilities Commission* v. *Duke*, 266 U. S. 570; *Wolff Packing Co.* v. *Industrial Court*, 262 U. S. 522; *Tyson* v. *Benton*, 273 U. S. 418. This too is a substantial federal question.

VI.

Defendant's claims and contentions that the Michigan "Civil Rights" Act violates the two named provisions of the Constitution of the United States, i.e., the Commerce Clause (Art. I, Sec. 8 (3)) and Sec. 1 of the 14th Amendment, were raised in the Court of first instance that being the trial court, by motion for directed verdict of not guilty (Michigan Supreme Court printed record p. 20 (hereafter designated as M. S. C.)), and by motion for entry of judgment of not guilty (M. S. C. 24), and by motion for a new trial therein seasonably made (M. S. C. 25), all of said motions attacking the said "Civil Rights" Act *inter alia*, as being violative of the commerce clause and of the 14th Amendment. All of defendant's said motions were denied and in due season and according to the practice of the State of Michigan defendant filed an application for leave to appeal to the Supreme Court of the State of Michigan (M. S. C. 54) and also filed its assignment of errors therein (M. S. C. 63). Both the application for leave to appeal and the assignment of errors alleged the unconstitutionality and the inapplicability of the said Michigan "Civil Rights" Act as to defendant in its aforesaid business under both the commerce clause and the 14th Amendment to the Constitution of the United States (M. S. C. 54, 63). The said claims and contentions of the defendant as to the unconstitutionality of the said "Civil Rights" statute were overruled by the Supreme Court of

Michigan. The trial court filed a written opinion upon the matters involved as did the Supreme Court of the State of Michigan, both of which opinions are appended hereto.

VII:

The opinion of the Supreme Court of Michigan (that being the highest court of that state) upon the matters herein involved was handed down on April 17, 1947, and judgment entered the same day. Thereafter, in timely and in due season and in accordance with the rules and practice of the Supreme Court of Michigan defendant filed an application for rehearing, which application was denied by the Supreme Court of Michigan on June 12, 1947. Such date therefore (June 12, 1947) is the date of the final judgment sought to be reviewed. Under decisions of the Supreme Court of the United States time for an appeal to that Court begins to run from the date of the denial of such application for rehearing. *Department of Banking* v. *Pink*, 317 U. S. 264; *Gypsy Oil Co.* v. *Escoe*, 275 U. S. 498. See also U. S. Code Annotated, Title 28, Section 350.

VIII.

The date upon which application for appeal herein is presented, is August 18, 1947.

Respectfully submitted,

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APPENDIX "A"

STATE OF MICHIGAN SUPREME COURT

83 January Term, 1947. Filed Apr. 17, 1947

THE PEOPLE OF THE STATE OF MICHIGAN, Plaintiff and Appellee,

v.

BOB-LO EXCURSION COMPANY, a Michigan Corporation, Defendant and Appellant

Before the Entire Bench

NORTH, *J.*:

The Bob-Lo Excursion Company, a Michigan corporation, having waived trial by jury was tried in the recorder's court of Detroit and found guilty of having violated the so-called civil rights statute of Michigan (Act No. 117, Pub. Acts 1937; Stat. Ann. 1946 Cum. Supp. Sec. 28.343). From its conviction defendant has appealed.

Defendant admits that in June 1945 its agents compelled a negro girl, the complaining witness herein, to disembark from one of its ships at the wharf in Detroit and denied her accommodations on its ship solely because she was a colored person. She was tendered repayment of the purchase price of her ticket. For its discriminatory action in refusing passage to the negro girl defendant was prosecuted and convicted under the cited act. The pertinent portion of the statute reads:

"Sec. 146. All persons within the jurisdiction of this state shall be entitled to full and equal accommodations, advantages, facilities and privileges of * * * public conveyances on land and water * * * and all other places of public accommodation, amusement, and recreation, where refreshments are or may hereafter be served, subject only to the conditions and limitations established by law and applicable alike to all citizens and to all citizens alike, with uniform prices."

Among the various purposes for which defendant was incorporated are: "To lease, own and operate amusement parks in Canada, and to charter, lease, own and operate excursion steamers and ferry boats in interstate and foreign commerce, together with dock and terminal facilities pertaining thereto." Decision herein presents the question as to whether defendant is engaged in foreign commerce. Defendant asserts that it is so engaged and in consequence thereof defendant claims that the quoted statute is not applicable and that defendant's conviction thereunder was unlawful.

In 1945 defendant's business was chiefly devoted to transportation of passengers to and from Bob-Lo Island (also known as Bois Blanc) and the operation of facilities for recreation and amusement owned by it on Bob-Lo Island. Except for four lots this Island is owned by defendant. It is a part of the Province of Ontario, Dominion of Canada. Only defendant's ships have access to Bob-Lo Island. Ordinarily these ships make round trips between Detroit and the Island, but occasionally they also make round trips between Windsor, Ontario, and Bob-Lo Island. But defendant does not transport passengers from Canada to Michigan. In traveling between Detroit and the Island defendant's ships cross the international boundary line several times and are in Canadian waters for about a half of the voyage. Defendant's ships are required by federal law to be enrolled by the United States Customs Service, and the enrollment license must be renewed annually. Defendant's commerce activities and ships are subject to regulations and inspection by the United States Treasury, the United States Immigration Service, the United States Navy Department and the United States Army Engineers. Its ships are also regulated by similar governmental agencies of the Dominion of Canada.

In the case of Gibbons *v.* Ogden, 9 Wheaton 1, 190 and 195, Chief Justice Marshall speaking for the Supreme Court of the United States, said:

"All America understands, and has uniformly understood, the word 'commerce,' to comprehend navigation. • • •

"But in regulating commerce with foreign nations, the

power of congress does not stop at the jurisdictional lines of the several states It would be a very useless power, if it could not pass those lines. The commerce of the United States with foreign nations, is that of the whole United States."

In the case of Lord *v.* Steamship Co., 102 U. S. 541, the Supreme Court said:

"The single question presented by the assignment of errors is, whether Congress has power to regulate the liability of the owners of vessels navigating the high seas, but engaged only in the transportation of goods and passengers between ports and places in the same State. It is conceded that while the Ventura carried goods from place to place in California, her voyages were always ocean voyages."

The question was resolved as follows:

"Commerce includes intercourse, navigation, and not traffic alone. • • •

"The Pacific Ocean belongs to no one nation, but is the common property of all. When, therefore the Ventura went out from San Francisco or San Diego on her several voyages, she entered on a navigation which was necessarily connected with other nations. While on the ocean her national character only was recognized, and she was subject to such laws as the commercial nations of the world had, by usage or otherwise, agreed on for the government of the vehicles of commerce occupying this common property of all mankind. She was navigating among the vessels of other nations and was treated by them as belonging to the country whose flag she carried. True, she was not trading with them, but she was navigating with them, and consequently with them was engaged in commerce. If in her navigation she inflicted a wrong on another country, the United States, and not the State of California, must answer for what was done. In every just sense, therefore, she was, while on the ocean, engaged in commerce with foreign nations, and as such she and the business in which she was

engaged were subject to the regulating power of Congress."

In view of the holdings in Gibbons *v.* Ogden, and Lord *v.* Steamship Co., supra, and of like holdings in many other cases which might be cited, it must be held in the instant case that the defendant is engaged in foreign commerce. And in the light of that determination decision must be made as to whether the so-called civil rights statute of Michigan, above cited, is valid or at least whether it is applicable to defendant under the facts and circumstances of the instant case. And in turn decision of that issue hinges on whether the cited Michigan civil rights statute imposes an unreasonable burden on foreign commerce. Since by the Federal Constitution the power to regulate both foreign and interstate commerce is vested in Congress,* due consideration must be given to pertinent decisions of the Supreme Court of the United States. We have so held as to interstate commerce, and that holding is equally applicable to foreign commerce.

"The power given congress by the United States Constitution to regulate commerce among the several States is exclusive, and the decisions of the United States Supreme Court upon that question are controlling." (Syllabus) People *v.* White, 197 Mich. 283.

Many cases hold that state legislation which unduly burdens interstate or foreign commerce is invalid, even where Congress has not acted. Such is the holding in the very recent decision of the United States Supreme Court in Morgan *v.* Commonwealth of Virginia, — U. S. —, 66 S. Ct. Rep. 1050. As stated in the headnotes in that case, the court held:

"State legislation or a final court order materially affecting interstate commerce is invalid, even where Congress has not acted.

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* U. S. Const., Art. I, Sec. 8.

"The Congress shall have Power * * *

(3) To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

"Where Congress has not acted, a state may validly enact legislation affecting interstate commerce, where the legislation has predominantly only a local influence on the course of interstate commerce.

"State legislation is invalid if it unduly burdens interstate commerce in matters where uniformity is necessary in the constitutional sense of useful in accomplish a permitted purpose.

"Because the Constitution puts the ultimate power to regulate interstate commerce in Congress, rather than in the states, the degree of state legislation's interference with that commerce may be weighed by federal courts to determine whether the burden makes the state statute unconstitutional."

We have given careful consideration to the various decisions upon which defendant relies, particularly Hall *v.* DeCuir, 95 U. S. 485; Pryce *v.* Swedish-American Lines, 30 Fed. Supp. 371; Henderson *v.* New York, 92 U. S. 259; and Board of Trustees *v.* United States, 289 U. S. 48. However, we are of the opinion that each of the above cases either by reason of the factual background of the legal issue involved must be distinguished from the instant case. In the Hall-DeCuir case, the court based decision upon the assumption that by reason of traversing the waters of various states and stopping at ports in such states the carrier might meet with statutory requirements of various types, and with which the Louisiana statute might be in conflict and compliance with both would be quite impossible. Under such circumstances the court held invalid the Louisiana statute which required "those engaged in inter-state commerce to give all persons travelling in that State, upon the public conveyances employed in such business, equal rights and privileges in all parts of the conveyance, without distinction or discrimination on account of race or color." Obviously the carrier in the instant case is not in its business confronted with the circumstances which led the court in the Hall-DeCuir case to hold that the Louisiana statute imposed an undue burden upon interstate commerce. In the instant case it quite conclusively appears that defendant in carrying on its commerce or transportation will not

be subjected to an undue burden arising from conflicting regulations by being required to render its services alike to both white and colored persons.

Pryce *v.* Swedish-American Lines, *supra*, is not a decision of a court of last resort and the court seems to have rather summarily based its decision, so far as its application to the instant case is concerned, upon the holding in Hall *v.* DeCuir, just above considered. Decisions in Henderson *v.* New York, *Supra*, and Board of Trustees *v.* United States, *supra*, are not particularly applicable to the instant case. Neither involved discrimination based on race or color. In effect the Henderson decision was merely that a state is without power to impose unreasonable requirements or a tax upon foreign commerce. And the holding in Board of Trustees *v.* United States was merely to the effect that "States and their instrumentalities" are not "relieved of the duties on articles imported by them" in foreign commerce.

The decisions cited by defendant are not controlling of the instant case unless it appears that the Michigan civil rights act imposes an undue burden on the foreign commerce in which defendant is engaged. That issue is material to decision — the instant case. But we are of the opinion that holding the provisions of the Michigan statute effective and applicable in the instant case results only in this, defendant will be required in operating its ships as "public conveyances" to accept as passengers persons of the negro race indiscriminately with others. Our review of this record does not disclose that such a requirement will impose any undue burden on defendant in its business in foreign commerce. As applied to the facts in the instant case the Michigan civil rights statute is neither in derogation of or in conflict with pertinent federal regulations. Instead the mandate of the Michigan statute is in accord with the federal civil rights act, which contains the following:

"All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings

for the security of persons and property as is enjoyed by white citizens * * *." R. S. Sec. 1977; U. S. C. A., Title i, Sec. 41.

While literally the provision of the interstate commerce act about to be noted applies to common carriers, nonetheless it is indicative of the character of federal regulations in this field of the law. The interstate commerce act prohibits common carriers from subjecting any person "to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." See paragraph 1, sec. 3 of the interstate commerce act, U. S. C. A., Title 49. Referring to the above provision the United States Supreme Court has said:

"Paragraph 1 of sec. 3 of the Act says explicitly that it shall be unlawful for any common carrier subject to the Act 'to subject any particular person * * * to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.' 49 U. S. C. 3. From the inception of its administration the Interstate Commerce Commission has recognized the applicability of this provision to discrimination against colored passengers because of their race and the duty of carriers to provide equality of treatment with respect to transportation facilities; that is, that colored persons who buy first-class tickets must be furnished with accommodations equal in comforts and conveniences to those afforded to first-class white passengers." Mitchell *v.* United States, 313 U. S. 80, 95.

There is no escape from the conclusion that defendant herein is engaged in the business of operating "public conveyances" by water, and the Michigan statute provides: "All persons within the jurisdiction of this state shall be entitled to full and equal accommodations" afforded by such conveyances. The Michigan enactment has been held constitutional. Holden *v.* Operating Corporation, 239 Mich. 316. Our conclusion is not only that the Michigan civil rights act is constitutional but that it is applicable to the business carried on by defendant; and further that it does not impose an undue burden on defendant's commerce activities.

In arriving at the above conclusion we are mindful of our decision in Meisner *v.* Detroit, Belle Isle & Windsor Ferry Co., 154 Mich. 545, wherein the present defendant's corporate predecessor was defendant. It was there held that the defendant engaged in the same business activities as defendant in the instant case, "is not, as to the enterprise named, a common carrier, and it may refuse to carry to such park anyone at its pleasure." But the holding in the cited case is not controlling in the instant case because the former decision turned solely on the holding that the defendant therein was not a common carrier. The report of the Meisner decision states: "The action is in tort, alleging a breach of defendant's duty *as a common carrier* of passengers." It does not appear in the Meisner case that plaintiff asserted a right under the Michigan civil rights statute; whereas in the case at bar that statute is of controlling importance. In the instant case decision is not controlled by defendant's being or not being a common carrier. Whatever its classification in that respect may be, it unequivocally appears from the record that it operates "public conveyances on * * * water" and that such operations have their inception in this State, wherein the statute provides all persons within the jurisdiction of the State shall be entitled to full and equal accommodations of such public conveyances. It is not amiss to note that one may be engaged in interstate or foreign commerce notwithstanding he is not a common carrier. An example of such a status is found in the operators of trucks who are contract carriers. But such carriers upon crossing State lines become engaged in interstate commerce, and upon crossing National lines become engaged in foreign commerce. Nonetheless they are not common carriers. Michigan Public Utilities Commission *v.* Duke, 266 U. S. 570.

The law of interstate commerce, but applicable alike to foreign commerce, in the light of which the instant case must be decided, with numerous supporting citations, is stated in 15 C. J. S. 268, as follows:

"However, the constitutional grant to congress of power to regulate interstate commerce, although operating of its own force to curtail state power in some measure, does not

forestall all state action affecting interstate commerce; it does not withdraw from the states power to legislate in respect of their local concerns, even though such legislation may indirectly and incidentally affect interstate commerce. Although state legislation affects interstate commerce incidentally, indirectly, or remotely, yet where it does not undertake to regulate such commerce and is no more than a bona fide, legitimate, and reasonable exercise of the reserved police power of the state in respect of matter of local or internal concern, it is valid and * * * will stand, in the absence of conflicting and superseding legislation by congress in the exercise of its superior authority to regulate commerce among the states."

The decision of the lower court is affirmed.

APPENDIX "B"

STATE OF MICHIGAN

IN THE RECORDER'S COURT FOR THE CITY OF DETROIT

File No. 27124

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff,

vs.

BOB-LO EXCURSION COMPANY, Defendant

DECISION ON MOTION AND VERDICT

Only one witness for each side testified at the trial, the complainant for the People and Mr. Devereaux for the defense. The Complainant, Miss Sarah Ray, testified she was a negress and that on June 21, 1945 she was refused passage and other facilities and accommodations on the Bob-Lo Boat by the defendant company, although her fellow employees and companions—all of whom were of the Caucasian race were granted passage, privileges and accommodations on said boat by said Bob-Lo Excursion Company. Mr. Devereaux, an employee of said defendant com-

pany, agreed with complainant's testimony and also answered some questions from his own personal knowledge and some from exhibits—which were introduced—relative to the type of business or commerce of the defendant company, plus data on inspections, immigration, rates, etc.

On cross-examination of Mr. Devereaux, it was shown that the Bob-Lo Excursion Company ran "ads" in the public press for business or rather passenger trade and that the tickets sold were what might be called "Round Trip Tickets." In short, the testimony was very brief, as counsel for each side more or less agreed to the facts in the case.

At the end of the People's case and again at the conclusion of trial, the defendant, through its counsel, moved for a directed verdict of not guilty. Oral arguments were made and briefs filed and the matter stood adjourned until today for the Court's decision and verdict.

In treating and considering this matter in its entirety, the Court has divided the same into six (6) divisions:

1. Statement of Facts
2. Statement of General Rules
3. Analysis of Cases in Defendant's 1st Brief
4. Analysis of Cases in Defendant's 2nd Brief
5. Questions involved—Answers—Authorities
6. Decision on Motion and Verdict.

General Rules

Congress has exclusive plenary power under the Constitution to regulate our state and foreign commerce. However, the states still have police power within their borders to pass legislation, even although it may incidentally regulate, for state purposes only, their citizens, including also those citizens who accommodate the public for hire within state jurisdiction.

The navigable waters adjoining the state are within state jurisdiction and defendant is a Michigan corporation, and therefore, a Michigan citizen.

Defendant operates a public conveyance on water, since it operates a steamer, advertises pleasure cruises and fixes the price to the public. It is not a common carrier. It

does not have *that* special relationship with the state; nor the special privileges of the common carrier.

Since defendant is a Michigan citizen operating to and from Michigan, it may not discriminate on the grounds of race or color when carrying passengers for hire to and from Detroit. If it does discriminate on either grounds in Detroit, it violates the Civil Rights Act. This defendant is charged with a violation of that act in Detroit.

Defendant claims, of course, that because it operates a pleasure park on an island owned by it, located in Canadian waters, and because to reach that island it must go partly through Canadian waters, that it is engaged in foreign commerce. The evidence does not show that the island is inhabited except, perhaps, by some of defendant's employees engaged in the operation of the amusement park. That park is operated entirely for defendant's benefit for profit. The steamer on which complainant was refused passage operates from defendant's wharf in Detroit through the Detroit River into Lake Erie and stops at Bob-Lo Island in Canadian waters. It stops nowhere else and it returns to Detroit. No one-way tickets are sold. Freight is not carried except such as may be used by defendants in operating their amusement park. It makes no other stops in Canada. Its advertisements hold it out as offering pleasure cruises, as well as the amusement to be had on Bob-Lo and not all passengers alight at Bob-Lo.

According to the brief, defendant has both United States and Federal Maritime licenses. It is subject to the regulation of the United States as regards the food and drinks served by it on the island. Apparently, there is no Canadian inspection. It reports to the United States Customs and Immigration Departments, as well as to the Canadian. It is subject to the United States regulation as regards its equipment on the steamer. Apparently, the Canadian regulations have to do merely with preventing uninspected importation or immigration for which this defendant has no license.

As a carrier of passengers, defendant is subject to direct regulation by Congress whether under the Interstate Commerce Commission, the Maritime Commission, The Federal Shipping Act, or similar Federal regulation.

The Interstate Commerce Act, while directed to the business of common carriers only, expressly insists upon prohibition of discriminations of any type. That prohibition is broad enough to forbid discrimination on the grounds of color, as the Mitchell case cited by defendant affirmatively shows. By its terms, the Interstate Commerce Act includes commerce with an adjacent foreign nation originating in the United States.

Of course, Congress has no regulatory power over foreign commerce, except by treaty, or except such as originates in the United States or ends there or both. If it does originate and end within the United States, Congress' power is clear, even although part of the trip may be through foreign territory or over foreign waters. A state has no jurisdiction beyond its borders. Michigan's jurisdiction includes the navigable waters adjoining Michigan to the center line. Of course, Michigan does have jurisdiction over offenses committed in Detroit.

Conveyance by water which starts from Detroit, goes through American and Canadian waters to an island in Canadian waters, owned and operated by defendant, said conveyance carrying passengers who buy only round trip tickets in Detroit to go and return and carries no other passengers, even though it allows temporary disembarkment at the passenger's election on the island in Canadian waters, is not, I think, engaged in foreign commerce.

Transportation is commerce, but transportation to and from Detroit with the temporary stop-over is not, the Court thinks, foreign commerce. If the amusement is commerce, it is not foreign commerce even though on foreign soil, unless it includes some type of inter-course or exchange with a foreign nation. This inter-course or exchange on Bob-Lo is controlled by American citizens and involves no foreign inter-course.

Moreover, the Civil Rights Statute of Michigan is not an attempt by our state to regulate directly either Interstate or Foreign Commerce, even though it may incidentally affect some Michigan citizens who engage in such commerce. It follows that even if we assume that defendant's business is, as it claims, foreign commerce, it is still subject to state

regulation under the state police power for acts committed in the state. If the statute does affect such citizens' commerce incidentally, it still does not contravene the plenary right of Congress to regulate.

The rule is well settled that if Congress does regulate in a given field of commerce, the state's police power may not regulate in the same field. The commerce clause was intended to give Congress exclusive power in fields where a single authority is indicated. However, where Congress does not or has not regulated, the state may regulate within its own jurisdiction even though the regulation directly affects commerce, unless there has been some Congressional indication that in that particular field of commerce Congress desired commerce to be wholly untrammeled.

That situation, of course, does not here exist. Every regulation of commerce controlling either Interstate or Foreign Commerce and emanating from the Congress has been declaratory against discrimination. Clearly, therefore, it must be inferred that Congress does not desire *any* type of commerce to indulge in race discrimination.

It is true that a state exercises of police power whether aimed directly at commerce or not, will not be held valid if it imposes an additional and unreasonable burden on either Interstate or Foreign Commerce. Assuming, though not admitting that defendant is engaged in commerce at all, other than transportation, still the statute imposes no burden upon defendant. The Civil Rights Statute forbids discrimination but it makes no mandatory provision. If the defendant should desire to outfit its steamer with separate equal accommodations for whites and colored and it is engaged in foreign commerce, such an outfitting would, under the decisions, be valid as far as Federal supervision is concerned. However, our statute does not burden defendant with the requirement that it must so segregate. It merely lays down the rule that defendant may not discriminate against citizens of Michigan or residents of Michigan, either on the score of race or color.

An analysis of all decisions cited by defendant reveals no support for defendant's contention that the Michigan Statute contravenes Congressional power over foreign com-

merce. The only case which appears to so hold is Pryce *v.* Swedish-American Lines, 30 Fed. Supp. 371. However, that case is:

1. Not a decision by an Appellate Court.
2. Is based squarely upon the decision of Hall *v.* DeCuir, 95 U. S. 485, where the La. Statute was held as constitutional.

because,

a. Expressly said by the La. Supreme Court to operate interstate.

b. Was expressly found by the U. S. Supreme Court to burden commerce.

Our Civil Rights Statute claims no extra territorial jurisdiction and asks to impose no burden.

Analysis of Defendant's Citations

Cases in First Brief:

It should be noted that throughout the brief defendant uses, interchangeably, the terms "public conveyance" and "common carrier." They are not the same. This defendant is a public conveyance and a carrier but not a common carrier.

1. Public Utilities *v.* Duke, 266 U. S. 577.

This was a case where the United States Supreme Court held a Michigan statute to be unconstitutional because: First, it was a direct regulation of interstate commerce. Second, it imposed a direct burden by forcing upon all carriers, who used Michigan highways, the liabilities of common carriers.

Defendant Duke was a citizen of Ohio, who operated freight trucks and had three contracts to carry furniture from Ohio to Michigan. The act declared unconstitutional would have compelled him to live up to the duties of a common carrier, although he did not have the special privileges of such a carrier, such as eminent domain. The Supreme Court said that a private carrier could not be made a common carrier by legislative fiat.

2. Meisner *v.* Ferry Company, 154 Michigan 545.

In that case, the defendant was the predecessor of the defendant in the instant case. It was sued for discrimination in refusing to carry plaintiff. This was not a discrimination for race or color and, therefore, the earlier version of the Civil Rights statute, then in effect, could not have been invoked. The theory of the suit was that as defendant was a carrier, it could not pick and choose passengers in the absence of misconduct. This was the law of common carriers at common law. However, the Supreme Court held that defendant was not a common carrier, it did not have the special privileges of a common carrier and could select the passengers it chose to carry. The decision pointed out that defendant was as much a private business as a theatre or a race course. This is significant because the Civil Rights Statute penalizes discrimination on the part of theatres and race courses, as well as conveyances, if the discrimination is based on race or color.

In the Meisner case, there was not discussion of whether or not the defendant was a public conveyance. The only distinction drawn was between common carrier and a private carrier. Many private carriers are public conveyances if they hold themselves out to the public for hire.

That decision throws no light whatsoever on the question in the instant case.

Defendant cites cases to prove that criminal statutes must be strictly construed and also that state courts are bound by the decision of the United States Court on Federal constitutional questions. Those cases will not be discussed, since those *principles* are conceded.

3. Hall *vs.* DeCuir, 95 U. S. 485.

This was an appeal from a decision of the La. Supreme Court, affirming a judgment for damages in favor of Mrs. DeCuir, a colored woman who had taken passage on defendant's steamer plying the Mississippi River between points in Louisiana and in adjoining states also. She was refused entry to the cabin reserved for white persons, although she was offered accommodations in the negro section, which

she refused. The Louisiana statute prohibited carriers from discriminating on the score of race or color. It was a direct regulation of commerce, therefore, and the La. Supreme Court in its decision stated that the statute was broad enough to apply to interstate commerce. Mrs. DeCuir had recovered damages and the owners of the steamer appealed.

The United States Supreme Court said that they must accept the holding of the Louisiana Supreme Court; that the statute was intended to have interstate effect. This, they said, was to contravene the power of Congress to regulate commerce interstate. They also pointed out that this regulation, besides being interstate, would impose a burden upon commerce because two of the adjoining states had statutes which required carriers to segregate whites and colored. They said that the steamer might have to have accommodations for whites and colored elsewhere if it passed through the waters of the Mississippi, for example, and when the steamer reached Louisiana, it would be compelled to change the system and mingle the two; and then, perhaps, at the next stop, segregate them again in another state, which would be burdensome.

On the score, then, that it was a direct and deliberate regulation of interstate commerce and that it imposed a burden upon commerce, they held the statute unconstitutional.

The distinction between that case and the instant case is clear. Our Civil Rights Statute is not a direct regulation of commerce. It is only incidental. Moreover, our Court does not claim that the statute has extra territorial effect or applies to interstate commerce directly.

The DeCuir decision reflects the earlier Federal decisions which attempted to meet the southern problem arising under the 14th Amendment. Technically, the decision is correct, but inapplicable here.

4. Mitchell *vs.* United States, 313 U. S. 80.

Mitchell, a colored Congressman, took passage from an interstate journey starting in Illinois and including among other states, Arkansas. He paid a first class passage but

at the Arkansas border, he was compelled to transfer to a second class cabin, because Arkansas had a law requiring carriers in the state to segregate white and colored. He was offered a refund on his ticket, which he refused. He made complaint to the Interstate Commerce Commission that the railroad was discriminating. The Commission held a hearing at which it was shown that very few colored persons demanded first class passage. It was also shown by the testimony that the first and second carriages differed. Actually, second class accommodations were greatly inferior in a number of respects. The Commission ruled that in view of the circumstances, the discrimination was not unreasonable. Mitchell appealed to the United States Supreme Court which reversed the Commission's finding, holding that the discrimination forbidden in the Interstate Commerce Commission Act included color discrimination. That such discrimination was unreasonable. That while Arkansas had a right to demand segregation, that did not relieve the railroad from the duty to avoid discrimination by offering equal accommodations to persons of both colors.

The statute was not, as defendant's brief alleges, held void. It was conceded that the state had the power to make such a statute, but that it could not affect interstate commerce so as to negative the Interstate Commerce Act which prohibited discrimination.

In the case at bar, if defendant is really engaged in foreign commerce, as it claims, and if the same rule applies under the Act, which it probably does, then consistently with the Mitchell decision, this Court should find that the Civil Rights Act is valid as affecting such commerce, but that it cannot affect it so as to require the carrier to refuse the passenger equal accommodations. In other words, Congress has forbidden common carriers to refuse equal accommodations in interstate commerce or in a commerce to the United States to a foreign or adjacent country, or from such a country to the United States. The Supreme Court has ruled that they may segregate in the states which so require so long as accommodations are equal. This, of course, does not license carriers to refuse *all* accommodations. Insofar as it is applicable at all, the Mitchell decision refutes defendant's contention, since under it Congress has

gone on record as demanding equality of accommodation and as branding denial, thereof, as discriminatory, both in state or interstate commerce.

Since, however, the Interstate Commerce Act attempts regulation only of common carriers, the case is applicable only by analogy. However, it also shows affirmatively that Congress does not desire all commerce under its control to be so untrammeled that it may indulge in racial discrimination.

It is unfortunate that since defendant is not a common carrier, this complainant cannot have recourse to the same procedure adopted by Mitchell under the Interstate Commerce Act. She cannot, however, because that Act expressly applies only to common carriers.

In passing, the Court remarks that statutes, such as Arkansas and some other states, mostly southern, have passed, would be held unconstitutional in Michigan as Michigan decisions hereinafter discussed affirmatively show.

5. Edwards *vs.* California, 314 U. S. 116.

This involves a California statute which attempted to discriminate against indigent persons seeking to enter the state and made it a penal offense to assist in such entry. Defendant Edwards brought his brother-in-law from Texas into California by car. The evidence showed that the brother-in-law was indigent within the meaning of the California statute and Edwards was found guilty. He appealed and his conviction was reversed by the United States Supreme Court on the score that the California Act was an unconstitutional barrier to commerce and, therefore, not a valid exercise of the state police power. The Supreme Court in its discussion expressly recognized that a state statute exercising police power in a matter of local concern is valid, even though it may thereby affect interstate commerce (Syll. 2).

Justice Byrnes wrote the opinion. Justices Douglas, Black and Murphy, while concurring in the result, preferred to place the decision on the grounds that the statute violated the 14th Amendment and declined to find it a violation of the commerce clause. Justice Jackson, in a third concur-

ring opinion, expressly repudiated the commerce clause reason.

The California regulation was expressly aimed at interstate transportation. It had no other purpose. It also expressly denied the rights of national citizenship. Under either viewpoint, the decision was correct but offers no support to defendant's position in the instant case. In our case, the Statute only incidentally touches upon commerce outside the state and it does not deny to any citizen the equal protection of the laws.

6. *Pryce* vs. *Swedish-American Lines*, 30 Federal Supplement 371.

This was decided in 1930 but never carried to any Appellate Court, so that it is in no sense authority.

Mrs. Pryce, a colored American citizen of New York, bought a ticket to South America on defendant's line and was later refused accommodation expressly because she was colored. She made a complaint in New York under the state's Civil Rights statute, which is quite similar to our own. It was transferred to a lower Federal Court, apparently, a Maritime Court, presumably because of diversity of citizenship. Without any discussion, the Court declared the statute could not apply to defendant, expressly resting its decision on the case of *Hall* vs. *DeCuir, Supra.*

Since the New York state Supreme Court had not claimed extra territorial effect for its statute and since it was not shown that it had imposed an additional burden upon the defendant to accept Mrs. Pryce, the Hall-DeCuir decision was not authority in such a decision for the Pryce decision. No other reason was given. In this Court's opinion, an appeal to the United States Supreme Court, or even to the Circuit Court of Appeals, would have resulted in reversal. In any case, the decision of such a court is in no sense binding. If it were, then a common carrier operating from a point in the United States to a foreign or adjacent country, the defendant would have been under the supervision of the Interstate Commerce Commission and would have been held guilty of unreasonable discrimination, as was the defendant in the Mitchell case.

Defendant, in his brief on page four, contends that the effect of these citations is to prove that Congress only has power to regulate foreign and interstate commerce and that its failure to act is equivalent to a declaration by Congress that commerce in that field shall be unregulated. However, that is not the effect of these citations. It is true that Congress under the Constitution is given power to regulate interstate and foreign commerce. It is further true, as the decisions point out, that if Congress fails to regulate in any particulars field, there are two possible results:

1. Its failure may be held to indicate a desire by Congress that in such a field, commerce is to be unhampered or it may indicate that Congress in that field desires to leave regulation to the states under their police power.

In a situation where Congress, in every recorded regulation of commerce so far as it has regulated, has forbidden the very thing that Michigan statute forbids, namely, racial and color discrimination, but where Congress has applied its ruling only to common carriers, it cannot logically be argued that Congress desires other types of commerce to be free to so discriminate. Inferentially, at least, Congress has left to the state police power to regulate against discrimination in commerce.

The difficulty, of course, with decisions is that they do not necessarily each arise in the same way and no one considers all the points which may be raised in another, wherein circumstances are similar. In citing decisions, therefore, it is safest to first analyze them from both viewpoints.

For example, Hall *v.* DeCuir would say that Louisiana had gone beyond its police power in attempting to directly regulate commerce. They said so because the Louisiana Court had said so and had said that the Act had extra territorial effect. However, in our Michigan case, there is no such direct regulation of commerce and no claim that the Act regulates interstate commerce either.

2. The Duke case again decides only that a state statute may not so regulate carriers using Michigan highways as to make them assume the burden of being common carriers when they are not.

The Mitchell case simply shows that Congress, by regulation, forbids discrimination and that that regulation requires carriers, subject to the Act, to furnish equal accommodations. As a result, if the carrier, as that one did, passes through a state where the state law requires segregation by color, the carrier must segregate but must still offer equal accommodations. That case does not decide whether or not the Arkansas statute is unconstitutional.

The Meisner case, on which the defendant relies so heavily, has no reference to commerce at all, while the Edwards case is a state attempt to directly prohibit one type of interstate commerce.

Defendant cites further cases where state statutes enacted under the police power were held to be unconstitutional as attempts to regulate interstate commerce. All those applicable were direct regulations of interstate commerce; none cited were statutes forbidding discrimination under penalty within a state, of carriers who might also operate beyond the state lines.

7. Defendant cites Gloucester Ferry Company *v.* Pennsylvania, 114 U. S. 96.

This proves that transportation is commerce, which is admitted and that it requests uniformity of regulation, which, second statement, is only partly true. In that case, defendant operated a ferry, carrying freight and passengers from a point in New Jersey to Pennsylvania and vice versa. It was a New Jersey Corporation and operated on the Delaware River between the two states, owned a dock in New Jersey and leased one in Philadelphia. It owned no property in Philadelphia except the lease and its ships stopped there only long enough to discharge and take on passengers and freight.

Pennsylvania attempted to tax the entire corporate stock of defendant, holding that it was doing business in Pennsylvania, but the United States Court held that its business was in interstate commerce and so not taxable by the state where it held no property, except that the lease could be taxed.

"Commerce among the states" the Court said, "consists of intercourse and traffic between *their citizens* and includes the transportation of persons and property and the naviga-

tion of public waters for that purpose, as well as the purchase, sale and exchange of commodities." * * * "Congress alone, therefore, can deal with such transportation; its nonaction is a declaration that it shall remain free from burdens imposed by state regulation. Otherwise, *there would be no* protection against conflicting regulations of different states, each legislating in favor of its own citizens and products and against those of other states." Clearly, then, the basis of that decision and of the decisions which hold state statutes to be burdensome was the danger of conflicting regulations, if any but Congress could legislate, a danger arising when each state tried to favor its own. Clearly, the type of police regulation in the case at bar does not fall within that purview, since there is no danger to be apprehended from conflicting jurisdictions. Canada can regulate defendant only to prevent violations of the customs or the immigration laws. It cannot require segregation nor compel defendant to refuse passengers because of color. The decision in the Gloucester Ferry case, then, does not go so far as to prevent a state from exercising its police power in its own territory, to prevent color discrimination, even although the defendant is engaged in foreign commerce and intends when it leaves Michigan to go in foreign waters.

It should be pointed out, too, that in the Gloucester Ferry case, passengers were landed on both sides of the river and embarked from both sides and freight came from both sides so that it was truly interstate. This defendant, however, carries only passengers from Detroit and the same passengers back to Detroit, and it does not land in any Canadian port as part of the trip. It is not, we think, commerce at all, or if it is, it is not foreign commerce.

8. Railway *v.* Covington, 235 U. S. 537.

This was held to be a direct regulation of interstate commerce, and was also held to be unreasonable and burdensome. The regulation was a statute of Kentucky regulating the operation of straight course which ran over a bridge from Covington, Kentucky, to Cincinnati, Ohio, which bridge had been held in a prior decision to be an instrument of interstate commerce. Single fares were collected, some to start in Kentucky and others to start in Ohio. In decid-

ing that it was interstate commerce, the Court pointed out expressly that the test of interstate or state (character), is to be derived from what is actually done and from inquiring whether transportation is really and in fact between the states. This case is important as emphasizing the differences between state and interstate transportation. They based the interstate decision on the fact of one-way fares. Defendant's fares are all two-way, originating and ending in Michigan.

9. South Carolina, *v.* Branwall Brothers, 303 U. S. 177.

Cited by defendant, this decision perfectly supports the validity of the Michigan Civil Rights Act and definitely denies the correctness of the defendant's position.

A United States District Court, at the request of Branwall Brothers, which was an interstate trucking company, had enjoined the State of South Carolina from enforcing a state statute, which prohibited the use, on state highways, of motor trucks weighing more than twenty thousand pounds. This applied to all trucks, including interstate trucks. However, the United States Supreme Court reversed the District Court hold—that the statute was reasonable and not a violation of the commerce clause.

The District Court had said that it was burdensome on traffic which would normally go through South Carolina and, therefore, was an unreasonable regulation of commerce interstate. The Supreme Court answered that Congress had not undertaken to regulate said interstate traffic; that the object of the regulation was to improve intra-state commissions and was not *discriminatory* against other states; that it has always been recognized that there are matters of local concern, the regulation of which unavoidably involves some regulation of interstate commerce but which, because of their local character and their number and diversity, may never be fully dealt with by Congress.

So, Michigan, as well as South Carolina, has a right to regulate its places of public accommodation, even though this results, incidentally, in the regulation of defendant, who claims to be engaged partially in foreign commerce. Here is no attempt to discriminate between citizens and non-citizens, because defendant is a Michigan citizen. This is

merely a state regulation on a local matter. On this point, because of their number and diversity, Congress has not tried to regulate all carriers—only common carriers—by regulating common carriers against color discrimination. However, Congress has indicated that it does not consider such regulation a burden and does not desire to leave the field of foreign commeree free. Clearly, then, our regulation is valid because:

a. It is reasonable.

b. It is not burdensome.

c. It affects outside commerce, if at all, only instantly.

d. It is in accord with the Congressional viewpoint against color discrimination.

10. The Minnesota Rate Case *vs.* 230 U. S. 352.

These cases held affirmatively that "Congressional nonaction on the subject leaves each state free to establish maximum intrastate rates for interstate carriers, which are reasonable, even though these may require readjustment at state boundaries, certainly that decision offers defendant no support.

11. Kansas Gas Company *v.* Kansas, 265 U. S. 298.

Defendant corporation was engaged in piping gas, originating in Oklahoma and in Kansas, in pipes through the State of Kansas to Missouri and in selling to distributors in both Kansas and Missouri. The Kansas Public Utility Commission attempted to fix the rates *to* which defendant could sell. However, the Supreme Court held that the business was purely interstate, but that Kansas could fix the rate for distributors to sell in Kansas, but could not govern an interstate carrier selling in Kansas to distributors. This, they held, would be a direct burden, and purely interstate commerce. The Court can see no benefit to defendant by this decision.

Finally, defendant cites its own case in the Wayne Circuit Court, No. 219803 in Chancery. The Circuit Court is, of course, a Court only of concurrent jurisdiction with the Court and the decision, whatever it was, is in no sense binding.

Defendant's last assertion in his brief that a corporation as a citizen has the same rights as an individual is not disputed, but not here involved, so the Court passes the citations offered by the defendant on this point.

ANALYSIS OF DEFENDANT'S SECOND BRIEF

I. Defendant repeats its reliance upon the Meisner case, which is here inapplicable. Defendant also again insists that because it is not a common carrier it is not a public conveyance. However, it does offer public accommodations for hire and that is the test, not the type of ownership or the type of a corporation.

Defendant also insists that because the statute reads "public conveyance on land and water" and because defendant only operates on water, the statute does not apply. Michigan decisions have repeatedly held that the words "and" and "or" may be either conjunctive or disjunctive and that the test is intent. One such decision is Elliott *v.* Market, 286 Michigan 112, where the Court construing the statute on bulk sales held that "or" should be read "and." There is, of course, the further rule that a statute must not be so interpreted as to become absurd. The wording of this statute goes back to 1866 to a Federal statute from which it was copied. It has been enforced in Michigan since 1875. At that time amphibian planes had not been invented. Our attention has been called to no other type of conveyance, both on land and water.

II. Whether or not defendant is engaged in foreign commerce is, at least, doubtful. However, if it is, it cannot escape every type of state regulation, incidental or even direct, so long as the regulation is reasonable, not burdensome, and does not encroach upon Congressional powers.

The real test of foreign commerce is whether or not there is, in fact, traffic or inter-course with foreign nations. Another test is the location of the termini. Both are in Michigan.

Defendant's business is transportation plus amusement. Whether the passengers stay on board or get off at Bob-Lo, they still make no contacts with citizens of Canada, have no trade with them—the traffic or trade, if amusement, is

traffic—only with defendant. However, assuming that this is foreign commerce, the statute is still applicable. It is in a field not covered by Congress but it is the type of statute which Congress has approved in other cases by disapproving discrimination.

The offense committed by defendant was committed in Michigan and completed there. It is not a continuing offense. The offense consisted of the violation of a reasonable statute. Defendant asks "What in God's World" does the Michigan Civil Rights statute seek? The Court answers "It seeks to see that all of God's children have equal rights in Michigan."

III. Defendant refers to 109 U. S. 3, following:

The so-called Civil Rights cases, wherein the Supreme Court held the first two sections of the 1866 version of the Federal Civil Rights Statute to be unconstitutional. They so held, because they said that the constitution was the only source of Congressional legislative power. All else was reserved to the states. They said that the 14th Amendment did not give Congress power to legislate against discrimination, but merely to protect those against whom the states discriminated. They did say that Congress could legislate on that subject to regulate commerce. Congress has so legislated in the Interstate Commerce Act, but only as to common carriers. For the rest, the legislation job is still that of the states. Michigan performed that job when it passed its Civil Rights Act.

The Court agrees with defendant that dissenting opinions are not controlling, although they sometimes become majority opinions at a later time; as witness, for example, Child Labor Legislation and minimum wages. It is necessary to read each decision in the light of the conditions at the time and it is necessary to be sure on what grounds a decision rests. In citing both the Hall and the Edwards cases, defendant forgot to do just that. However, defendant cannot deny that our Michigan Supreme Court in Bolden *v.* Operating Company, 239 Michigan 318, has held that the Civil Rights Statute is not lack of due process under the Federal 14th Amendment. That case cites Ferguson *v.* Gies, 82 Michigan 358, my reading of which would form an ex-

cellent background to the case at bar. The court adds, also, that the United States Supreme Court has so decided in numerous decisions, among them, Snowden *v.* Hughes, 321 U. S. 1.

QUESTIONS INVOLVED

Question 1. Should a Michigan citizen, who claims to engage partly in foreign commerce, be wholly free from state regulation.

Answer 1. a. Defendant says yes.

b. Plaintiff says no.

c. The Court thinks the answer is no, provided that such regulations are not a direct burden or do not encroach on Congressional regulation. If they are a valid exercise of police power, affecting outside commerce only incidentally, we believe that anyone in Michigan must obey them or suffer the consequences. *South Carolina* v. *Branwall Brothers*, 303 U. S. 177; *Colley* v. *Post Wardens*, 12 How. 299, 13 L. Ed. 996. The type of legislative regulation forbidden most of the states must constitute a direct and substantial interferenee with commerce. *U. S. F. & G.* v. *Ky.*, 231 U. S. 394; *Boston etc. Rule* v. *Ambrey*, 285 U. S. 234; *California* v. *Thompson*, 313 U. S. 109, 113.

Question 2. Is defendant engaged in foreign commerce?

Answer 2. a. Defendant says yes.

b. Plaintiff says no.

The Court's answer is "could be."

Transportation is commerce, but defendant's transportation begins and ends in Michigan though it does go through foreign waters. There is no traffic with foreign nations. Whether or not that is foreign commerce is questionable.

A decision in each case on whether or not it is interstate or foreign commerce depends on the circumstances of the case. In one Federal case, *Covington* v. *Kentucky*, for example, it was decided that a street car running across a bridge between Kentucky and Missouri was engaged in interstate commerce, because one-way tickets were sold at either end. Here, only roundtrip tickets are sold and must be purchased in Michigan.

Also, in *New York Ex. Ral. Cornall* v. *Sohmes, Controller*, 235 U. S. 548, it was held that a tax on the gross earnings of a steamship can be imposed, but the state of New York was not so burdensome as to encroach on Congressional power when the evidence showed that the only interstate commerce in which the Company indulged was daily trips across the Hudson to New Jersey to pick up toy boats. Every steamer picked up a tow in New Jersey but no one landed there. The termini were all in New York.

Question 3. Assuming that defendant *is* engaged in foreign commerce, has Congress regulated such commerce by allowing or forbidding discrimination on the grounds of race or color to all engaged in such commerce?

Answer 3. Not as far as the Court can discover and defendant cities no such regulation.

Congress, by the Federal Motor Carrier Act, the Maritime Shipping Act and the Interstate Commerce Act, has forbidden unreasonable discrimination to common carriers, whether they are engaged in interstate commerce or in commerce between the United States and an adjacent foreign country. It has not regulated other carriers on this subject.

The Court does not think that that can be taken to mean that Congress indicates it wishes all other commerce, except by common carrier, to be free to discriminate. On the contrary, we are certain that it means that Congress is always against discrimination but leaves the more local problems to local authorities, even though, incidentally, the regulations may have extra territorial effect.

Question 4. Is the Civil Rights Regulation reasonable?

Answer 4. a. Plaintiff says yes.

b. Defendant says no.

c. The Court thinks that it is reasonable and is in line with all Michigan decisions since the Civil War, as well as the decisions of the United States Supreme court, including the Mitchell case. It is not out of line with any decision.

Question 5. Is the regulation burdensome?

Answer 5. a. Plaintiff says no.

b. Defendant says yes (I assume).

c. The Court feels that it is not burdensome. It is intended to govern intra-state commerce, incidentally, and is reasonable, even though interstate or foreign is affected. The Supreme Court of the United States in *Louisville Railroad* v. *Mississippi*, 133 U. S. 589, has upheld a state statute regulating carriers in Mississippi and compelling segregation. This was held not to be burdensome. If it is not burdensome to compel a type of discrimination, it is certainly not burdensome to compel a citizen to refrain from that type or any type. Defendant will not have to make any change in equipment or any operation in order to obey the statute. All it will have to do, is to treat all citizens and persons, white or colored, alike. No Canadian treaty could interfere with the rights of American citizens against such discrimination. There is no possibility, then, of conflicting authority, which is the basis for calling some regulations burdensome.

Question 6. Does the Civil Rights Statute encroach upon the power of Congress?

Answer 6. a. Plaintiff says no.

b. Defendant says yes.

c. The Court thinks the answer is no. As far as Congress has acted, it has affirmed the theory of the Michigan statute. It has not acted beyond regulating common carriers, except in the passage of the present Federal Civil Rights Act, which guarantees "to all persons within the United States, the same right * * * to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens." In view of that discrimination, it cannot be said that Congress wishes commerce to be free to discriminate. The Court adds that white citizens are permitted to use defendant's steamers.

Decision on Motion and Verdict

The Court concludes that even if defendant *is* engaged in a very attenuated form of foreign commerce, which is no

certain, still the Michigan regulation is valid and applies.

While the defendant engages in no traffic or intercourse with the citizens of foreign nations and while it sells only round-trip tickets from and to Michigan and deals only with passengers taken on there, still, because it traverses Canadian navigable waters, let us assume it does *some* foreign commerce.

Still, the Civil Right Statute applies. That statute does *not directly* regulate commerce, except, as commerce is one form of "public accomodation." It claims no extra territorial effect; though, incidentally, one doing commerce in foreign waters may be affected while in Michigan.

The statute is valid under all decisions. It is a valid exercise of police power. The offense penalized is committed in Michigan. It is not burdensome at all. Defendant would need to make no change, except in policy, to obey it. It regulates one engaged in foreign commerce only incidentally.

It does not encroach on Congressional power over commerce. Congress has only attempted to regulate *common carriers* so as to forbid discrimination.

That leaves the field open to the States to regulate commerce at home against discrimination, even though it may incidentally affect outside commerce.

Congress has indicated its opposition to color discrimination as unreasonable, by common carriers. Certainly that affirmative regulation does not mean that it wishes all the rest of commerce to be free to discriminate unreasonably.

The statute is not a State attempt to favor its own citizens at the expense of other nations and states.

The motion for a directed verdict of not guilty is denied and the defendant (Bob-Lo Excursion Company) is found guilty as charged.

(Signed) JOHN J. MAHER,
Recorder and Judge.

Dated: November 16, 1945.